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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 490

JOHN L. BRADY,

Petitioner,

vs.

WARDEN OF MARYLAND PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND
AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
OF THE STATE OF MARYLAND

BRIEF FOR THE PETITIONER

E. Clinton Bamberger, Jr.
John Martin Jones, Jr.
900 First National Bank Bldg.
Baltimore 2, Maryland
Counsel for Petitioner

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals of Maryland is reported in 226 Md. 422 and in 174 A. 2d 167 and is included in the Transcript of Record (R. 46-52).

Jurisdiction

The opinion of the Court of Appeals of Maryland was filed on October 11, 1961 and the mandate of that Court was filed on November 10, 1961 (R. 53-54). The time within which to petition for certiorari was extended until April

9, 1962 by order of Mr. Justice Stewart dated February 9, 1962 (R. 55). The petition was filed April 7, 1962 and was granted October 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right, privilege or immunity is claimed under the Constitution of the United States.

Question Presented

The petitioner was found guilty of murder in the first degree and sentenced to death. In a post-conviction proceeding the Court of Appeals of Maryland held that suppression of evidence by the State denied due process of law to the petitioner. Although the petitioner sought a complete new trial, the Court of Appeals remanded the case for a new trial only on the question of punishment and not on the issue of guilt. The question presented is:

Whether the restriction of the petitioner's new trial to the question of punishment and the denial of a re-trial of guilt denies the petitioner's constitutional rights.

Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved

The constitutional provisions, statutes and rules of practice and procedure involved are set forth in the Appendix to this brief. The constitutional provisions involved are: Section 1 of the Fourteenth Amendment of the Constitution of the United States and Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), page 199. The statutes involved are: Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), page 172; Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), page 173 and

Article 27, Section 645 G, Volume 3, Annotated Code of Maryland (1961 Cumulative Supplement). The Rules of Practice and Procedure of the Court of Appeals of Maryland involved are: Maryland Rule 756b, Maryland Rules of Procedure (1961 edition), page 283; and Maryland Rule 756e, Maryland Rules of Procedure (1961 edition), page 284.

Statement of the Case

In Maryland, murder committed in the perpetration of a robbery is murder in the first degree. Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), page 172 (Appendix, p. 15). The punishment for murder in the first degree in Maryland is life imprisonment or death by gas and the jury may restrict the maximum punishment to imprisonment for life by the addition of the words "without capital punishment" to its verdict. Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), p. 173 (Appendix, p. 16). In Maryland the jury in a criminal case are " . . . the Judges of Law, as well as of fact, . . . ". Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199 (Appendix, p. 15).

In separate trials in the Circuit Court for Anne Arundel County the petitioner and a companion, Charles Donald Boblit, were found guilty of murder in the first degree and sentenced to suffer the penalty of death. The convictions were affirmed in a single opinion by the Court of Appeals of Maryland. *Boblit* v. *State*, 220 Md. 454, 154 A. 2d 434.

In extra-judicial statements to the police prior to his trial and in testimony at his trial, the petitioner denied

that he had murdered the victim. He blamed his companion, Boblit, with whom the petitioner admitted participation in the robbery of the victim. Prior to petitioner's trial his counsel had requested from the State's Attorney the opportunity to examine the extra-judicial statements made by the other defendant, Boblit (R. 24, 25, 28, 37 and 38). Counsel was shown several statements made by the petitioner and by Boblit but counsel was not shown an unsigned statement by Boblit dated July 9, 1958 (R. 39-41) in which Boblit admitted the actual homicide (R. 24, 25, 28 and 29). After the conviction and sentencing of the petitioner the State offered as evidence in the later trial of Boblit the extra-judicial statement (R. 39-41) in which Boblit admitted the murder of the victim. The petitioner and his counsel first learned of the existence of Boblit's statement of July 9, 1958 after the affirmance of the petitioner's conviction (R. 23, 24 and 34).

After the affirmance in the Court of Appeals of Maryland the petitioner moved the Circuit Court for Anne Arundel County to set aside the verdict and the sentence and to grant him a new trial on the ground that evidence newly discovered by him had been suppressed by the State. The petitioner's appeal from the Circuit Court's denial of the motion was dismissed by the Court of Appeals of Maryland without prejudice to the petitioner to seek relief under the Maryland Post Conviction Procedure Act. *Brady* v. *State*, 222 Md. 442, 160 A. 2d 912. The subsequent petition for post conviction relief was dismissed by the Circuit Court for Anne Arundel County (R. 2-15) and the Court of Appeals of Maryland granted leave to appeal.

The Court of Appeals held that suppression of evidence by the State denied due process of law to the petitioner. The case was remanded but only for a re-trial of the question of punishment without setting aside the

verdict of guilt and ordering a re-trial of that issue also. *Brady* v. *State*, 226 Md. 422, 174 A. 2d 167 (R. 46-52). The order of the Court of Appeals of Maryland states: "Judgment reversed and case remanded for the entry of an order not inconsistent with this opinion for a new trial on the question of punishment only." (R. 53).

The petition for post conviction relief prayed that the verdict and sentence be stricken and that the petitioner be granted a new trial. At the conclusion of oral argument in the Court of Appeals the Chief Judge asked counsel for the petitioner what relief he sought if the Court found that the petitioner had been denied due process and specifically whether he sought a re-trial of the issue of punishment only and not guilt also. Counsel replied that he sought a new trial of the entire case and both issues, guilt and punishment.

Summary of Argument

I.

The petitioner will never have a jury trial of his guilt or innocence with the suppressed evidence available to him. Other defendants will have such evidence to use in the trial by jury of guilt or innocence. Equal protection of the laws forbids such a unique, prejudicial, discriminatory and disparate proceeding. *Fay* v. *New York*, 332 U.S. 261, 285; *Dowd* v. *United States*, 340 U.S. 206, 209; *Griffin* v. *Illinois*, 351 U.S. 12, 17. The order of the Court of Appeals denies equal protection of the laws by restricting the petitioner's new trial to the issue of punishment.

II.

The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers* v. *Richmond*, 365 U.S. 534, 545. The verdict is not saved because other competent evidence would support it. *Culombe* v. *Connecticut*, 367 U.S. 568, 621. Even the false assumption that the suppressed evidence could affect only the jury's deliberation on the sentence, is not justification for the failure to set aside the tainted verdict. *Townsend* v. *Burke*, 334 U.S. 736. The order of the Court of Appeals denies due process of law by its failure to strike the verdict as well as the sentence.

ARGUMENT

I.

The Failure to Set Aside the Verdict Denies Equal Protection of the Laws Because It Subjects the Petitioner to a Unique and Prejudicial Variation of Criminal Procedure.

In Maryland, a homicide committed in the perpetration of a robbery is murder in the first degree punishable by death or life imprisonment. The maximum punishment for second degree murder is imprisonment for eighteen years and the maximum punishment for manslaughter is imprisonment for ten years.[1]

A Maryland jury is not obliged to convict a defendant of first degree murder even if the uncontradicted evidence

[1] Article 27, Sections 410, 413, 414 and 387, Volume 3, Annotated Code of Maryland (1957 ed.), pages 172, 173, 174 and 164.

or his own testimony would support the conviction. A Maryland jury in a criminal case are the " . . . Judges of Law, as well as of fact, . . . ". Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.) p. 199 (Appendix, p. 15). The Court of Appeals of Maryland has reiterated that this constitutional provision grants the jury the *right*, and not merely the power, to determine the applicable law; even contrary to instructions by the Court, which are merely advisory.[2] The Court before which the petitioner was tried recognized this rule when it instructed the jury that it could find five possible verdicts, including second degree murder, manslaughter and acquittal (R. 44-45).

Unlike all other defendants, the petitioner is denied a trial of guilt with the suppressed evidence available to him before a jury with the *right* to find him guilty of a crime less than first degree murder or even acquit him. The opinion of the Court of Appeals acknowledges that the petitioner should have had a trial with the prior knowledge of the suppressed evidence and guarantees that others accused will have such a trial. The mandate of the court denies such a trial for this accused. The Court of Appeals does not recognize this discrimination and so asserts no reasonable basis for it. There is no reasonable premise for the prejudicial segregation of the petitioner from others accused. There is no reasonable basis for the imposition upon the defendant of a finding of guilt after an unfair trial in which evidence was suppressed and due process of law denied.

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[2] *Vogel* v. *State*, 163 Md. 267, 272, 162 A. 705, 707; *Slansky* v. *State*, 192 Md. 94, 108, 63 A. 2d 599, 605; *Giles* v. *State*, 229 Md. 370, 183 A. 2d 359. Sources of the history of the Maryland constitutional provisions and discussions of the distinction between the power and the right of the jury in a criminal case to determine the law are cited in the *Giles* opinion in footnote 6, 229 Md. at page 385, 183 A. 2d at page 366.

If this petitioner would be tried for the first time tomorrow, he would have the suppressed evidence and the benefit of the knowledge of that evidence before the trial of his guilt. The proceedings against him would be the same as the trial of any other defendant in Maryland in similar circumstances. This is not the same proceeding as the new trial ordered by the Court of Appeals for the petitioner restricted to the issue of punishment and with guilt prejudged. Similitude between the petitioner and others before the bar is absent because the Court of Appeals refused the petitioner a trial of his guilt with prior knowledge of the suppressed evidence. No State may impress such a discriminatory restriction upon the right of an accused to a fair trial according to the procedure prevailing in ordinary cases. Similitude of proceedings is equal protection of the laws and the mandate of the Court of Appeals contravenes that constitutional guarantee. Equal protection of the laws forbids the prejudicial disparity imposed upon the petitioner. *Fay* v. *New York*, 332 U.S. 261, 285; *Griffin* v. *Illinois*, 351 U.S. 12, 17. Nothing short of a determination of guilt and punishment by a jury judging the law and the fact " . . . according to the procedure prevailing in ordinary cases . . . ", i.e. a complete new trial for the petitioner, will cure the denial of equal protection of the laws. *Dowd* v. *United States*, 340 U.S. 206, 209.

The unique, prejudicial proceeding against the petitioner is not justified by an argument that the evidence could not affect the jury's verdict of guilt. The Court of Appeals may not rule as a matter of law that the jury with the suppressed evidence or the fruit of it introduced at the trial would not have the right to find the petitioner guilty of a lesser crime than murder in the first degree or acquit him. That court did not have the right to say in its opinion that " . . . nothing in (the suppressed confession)

could have reduced the appellant Brady's offense below murder in the first degree." (R. 52). The jury is the sole judge of the law and the instructions of the court are advisory only. Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.) p. 199 (Appendix, p. 15); Maryland Rules 756b and 756e, Maryland Rules of Procedure, 1961 Edition, pp. 283 and 284 (Appendix, p. 17). If, as urged in the succeeding argument, the denial of due process of law vitiated the conviction, the petitioner has not had his guilt lawfully adjudged by a jury and no court in a criminal case is competent to instruct the jury to find a defendant guilty. *Sparf* v. *United States*, 156 U.S. 51, 105; *United Brotherhood* v. *United States*, 330 U.S. 395, 408.

The Court of Appeals was not at liberty to speculate on the gain the petitioner might have made with the suppressed evidence. It may not now serve a useful purpose to speculate except to establish that the evidence would have some value. The petitioner might have sought a trial to follow the trial of the co-defendant so that the co-defendant could be called as a witness without the shield of the privilege against self-incrimination. The co-defendant might then have admitted at the petitioner's trial the truth of the suppressed evidence, i.e. that the co-defendant was the actual murderer. A Maryland jury with this evidence before it might have found the petitioner guilty of a lesser degree of homicide or acquitted him. Even this speculation answers an irrelevant charge that the suppressed evidence and the knowledge of it could not affect the verdict of the petitioner's guilt.

There is no rational basis for the unique and prejudicial restriction imposed upon the petitioner. The order of the Court of Appeals denies to the petitioner equal protection of the laws and should be corrected by this Court.

II.

The Denial of Due Process of Law Vitiated the Entire Proceeding. The Verdict of Guilt Cannot Stand.

Nothing less than a fair trial from beginning to end will afford petitioner the due process of law the Court of Appeals found he was denied. The petitioner was overreached before his trial began when the State refused to tell him of the co-defendant's statement. From the moment of that suppression the whole of petitioner's trial was unfair, he had no trial, and the proceeding to which he was subjected was a nullity. That suppression occurred before the petitioner was found guilty and before he was sentenced. But the Court of Appeals would let the unfair verdict stand. If the petitioner has no more now than a re-trial of the issue of sentencing he will never have a fair trial of his guilt. The re-submission of only the sentencing issue leaves the petitioner convicted by an unfair trial.

When the Court of Appeals found that the petitioner had been deprived of due process of law, that court was not free to speculate upon what part of the trial might not have been tainted by the State's suppression of evidence. *Griffin* v. *United States*, 336 U.S. 704, 708-709; *Blackburn* v. *Alabama*, 361 U.S. 199, 206. The trial and every part of it can not stand because the suppressed confession "may have had an effect on the outcome of the trial." *Napue* v. *Illinois*, 360 U.S. 264, 272. An "error of constitutional dimension" in a criminal trial vitiates the entire proceeding. *Rogers* v. *Richmond*, 365 U.S. 534, 545. It does not matter that admissions by the petitioner or other competent evidence might support a guilty verdict even with the suppressed confession of the co-defendant in the record. *Payne* v. *Arkansas*, 356 U.S. 560, 567-568; *Culombe* v. *Connecticut*, 367 U.S. 568, 621.

The petitioner was entitled to the suppressed evidence when he requested it before the trial. The State's proceeding against the petitioner must begin again from the stage of the wrongful suppression. Nothing after that is now valid. What use the petitioner might have made of the knowledge wrongfully denied him or what profit he might have gained by it may not be assumed. Even if that assumption might be made, such a substantial error spoils all it touches. Infringements upon constitutional rights may never be so lightly regarded. *Stroble* v. *California*, 343 U.S. 181, 190. Even the false assumption that the suppressed evidence could affect only the jury's deliberation upon the sentence cannot justify a restriction of the remedy to a new trial on that issue alone. When constitutional rights were denied by the sentencing court after a plea of guilty, made and received without error, this Court struck down the conviction as well as the sentence. *Townsend* v. *Burke*, 334 U.S. 736. The Supreme Court of Pennsylvania questioned the scope of the *Townsend* opinion and resolved, after briefs and argument, that the petitioner there was entitled to another full trial of guilt and punishment, though the error occurred at sentencing. *Commonwealth* v. *Burke*, 361 Pa. 35, 63 A. 2d 77, *cert. denied*, 340 U.S. 915. This Court set the matter to rest in *Keenan* v. *Burke*, *Jankowski* v. *Burke* and *Foulke* v. *Burke*, 342 U.S. 881.

In *United States* v. *Baldi*, 104 F. Supp. 321, 328 (E.D. Pa.), the defendant was denied due process of law by the State's suppression of evidence relevant only to the degree of punishment for felony murder. The court set aside the " . . . *trial, verdict, conviction* and judgment of sentence . . . " and granted the writ of habeas corpus. (Emphasis supplied.) The decision was affirmed by the Court of Appeals in *United States* v. *Baldi*, 195 F. 2d 815 (C.A. 3), *cert. denied* 345 U.S. 904, *reh. denied* 345 U.S. 946. Al-

though the Pennsylvania jury would be bound by the court's instruction of the law of felony murder, the conviction unaffected by the suppressed evidence did not survive. The Maryland jury has the power and the right to judge the law and the court's instruction cannot bind it. Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199 (Appendix, p. 15); Maryland Rules 756b and 756e, Maryland Rules of Procedure, 1961 Edition, pp. 283 and 284 (Appendix, p. 17). No Maryland court has the right to judge the effect of the suppressed evidence because the jury is its own source of law.

The sole thrust of the petitioner's defense was that not he but his companion was the actual murderer. The suppressed confession of his companion would be persuasive evidence before the jury. That confession might have convinced the jury, as the judge of the law and the fact, to find the petitioner guilty only of a lesser degree of homicide or even to acquit him. The trial court instructed the jury, deliberating without the co-defendant's admission in evidence, that the jury could acquit the petitioner or find him guilty of a degree of murder less than first degree (R. 44-45).[3]

A trial with the suppressed evidence before a jury with the right to judge the law and the fact of the petitioner's guilt and punishment is the trial to which due process of

[3] The Court of Appeals of Maryland granted full relief in its previous opinion in *Day* v. *State*, 196 Md. 384, 76 A. 2d 729. Two defendants were convicted of felony murder. Each admitted the robbery but accused the other of the homicide. The defendants appealed from the trial court's denial of a severance. The State argued on appeal that neither defendant was harmed by the joint trial because the admission of the robbery was an admission of guilt of felony murder. The judgments were reversed and the cases remanded for new and separate full trials not limited to punishment.

law entitles the petitioner, is the trial the Court of Appeals found he did not have, and is the trial the Court of Appeals by its order paradoxically says he may not have.

The order of the Court of Appeals remanding the case for a new trial only on the issue of punishment without striking the verdict of guilt denies due process of law to the petitioner and should be corrected by this Court.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be reversed with instructions to amend the mandate of that Court to order a new trial for the petitioner without restriction upon the issues.

E. Clinton Bamberger, Jr.
John Martin Jones, Jr.
Counsel for Petitioner

December 17, 1962

APPENDIX TO THE BRIEF FOR THE PETITIONER

Constitutional Provisions, Statutes and Rules of Practice and Procedure Involved

Constitution of the United States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fourteenth Amendment.

Constitution of Maryland

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Article XV, Section 5, Constitution of Maryland, Volume 9, Annotated Code of Maryland (1957 ed.), p. 199.

Statutes of Maryland

"All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape, sodomy, mayhem, robbery, burglary, or in the escape or attempt to escape from the Maryland Pentitentiary [sic], the house of correction, the Baltimore City jail, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree." Article 27, Section 410, Volume 3, Annotated Code of Maryland (1957 ed.), p. 172.

"Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors, shall suffer death, or undergo a confinement in the petitentiary of the State for the period of their natural life, in the discretion of the court before whom such person may be tried; provided, however, that the jury in a murder case who render

a verdict of murder in the first degree, may add thereto the words 'without capital punishment,' in which case the sentence of the court shall be imprisonment for life, and in no case where a jury shall have rendered a verdict in manner and form as hereinbefore prescribed, 'without capital punishment,' shall the court in imposing the sentence, sentence the convicted party to pay the death penalty." Article 27, Section 413, Volume 3, Annotated Code of Maryland (1957 ed.), p. 173.

"The petition shall be heard in the circuit court or Criminal Court of Baltimore in the county or city where the conviction took place and before any judge thereof except the judge who sat at the trial at which the person was convicted, unless the person convicted consents to hearing by such judge. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a State right was presented and decided. This order constitutes a final judgment for purposes of review." Article 27, Section 645 G, Volume 3, Annotated Code of Maryland (1961 Cumulative Supplement). This statute was enacted by Chapter 44 of the Laws of Maryland of 1958, was amended by Chapter 429 of the Laws of Maryland of 1959 and was repealed by Section 1 of Chapter 36 of the Laws of Maryland of 1962. The pertinent provisions of the statute are now incorporated in Maryland Rules BK 44 and BK 45 effective January 1, 1962 which are not included in the 1962 Supplement of Volume 9 of the Annotated Code of Maryland but are in Maryland Rules of Procedure, 1961 Edition, pp. 496 and 497.

Rules of Practice and Procedure of the Court of Appeals of Maryland

"The court may and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law; the court may give its instructions either orally or in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only." Maryland Rule 756b, Maryland Rules of Procedure, 1961 Edition, p. 283. [Formerly, with modifications of style, Rule 739b, Volume 9, Annotated Code of Maryland (1957 ed.), p. 422].

"The court may give its instructions at any time after the close of the evidence. The giving of such instructions prior to the argument of counsel shall not preclude counsel from arguing to the contrary." Maryland Rule 756e, Maryland Rules of Procedure, 1961 Edition, p. 284. [Formerly, with modifications of style, Rule 739e, Volume 9, Annotated Code of Maryland (1957 ed.), p. 423].